



# **Disposal of Real Estate Assets by NAMA Debtors and Insolvency Office Holders**

**Version: 4.9**

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## **1 Introduction**

This document supersedes Version 4.8 previously published on the NAMA Website.

This document outlines NAMA's requirements in respect of sales by a Debtor or Insolvency Office Holder, of controlled Real Estate Assets that are subject to NAMA security or are included in an agreed disposal to repay outstanding debt to NAMA.

The timing of Real Estate Asset disposals will be agreed by Debtors or Insolvency Office Holders with NAMA. The objective is to obtain the best price reasonably obtainable for the Real Estate Asset in the marketplace at the time of sale, in the context of a phased and orderly disposal (subject always to an Insolvency Office Holder's statutory obligations in that regard).

A key principle is that disposals should be conducted on a competitive basis and in accordance with prevailing market norms.

## **2 Policy Basis**

NAMA has statutory powers, including those set out in S12 of the NAMA Act to manage loans and assets in a way that best serves its purposes as defined in S10 of the NAMA Act. NAMA will act at all times to obtain the best achievable financial return for the State commensurate with its policies, codes and guidance notes.

NAMA may be subject to guidelines and directions from the Minister as set out in S13 and S14 of the NAMA Act.

A copy of the S172/Excluded Person Confirmation (see Appendix 2) or Purchasers Warranty (see Appendix 3) should be furnished to NAMA by the sales Agent.

A summary of the key policy considerations are outlined below.

### **2.1 Open Marketing**

All Real Estate Assets must be openly marketed for sale and there are to be no exceptions to this rule in normal circumstances. Possible exceptions, which are subject to approval by CEO of NAMA, can be made in certain limited and specific circumstances – see Section 4.1.1 below for details.

### **2.2 Section 172 Policy**

NAMA has adopted a policy of obtaining (written) assurance that the purchaser of a Real Estate Asset is not connected with the relevant Debtor. For these purposes 'connected' refers to those parties in respect of which the provisions of S172 (3) of the NAMA Act would apply.

### 2.3 Excluded Persons

NAMA obtains written confirmation from the purchaser that neither the purchaser, nor any person with a beneficial interest in the transaction, is an Excluded Person (as defined in Section 4.3 below).

## 3 Overall Objective / Purpose

The disposal of Real Estate Assets by Debtors and, in some cases, appointed Insolvency Office Holders, is likely to be the main source of repayment of a Debtor's outstanding indebtedness to NAMA. The conduct of these disposals should be done on a competitive basis and in accordance with prevailing market norms for the asset class and jurisdiction having regard to NAMA's objectives set out in S10 of the NAMA Act.

## 4 Disposal Process

The following procedure is applicable to all **Real Estate Asset** disposals:

### 4.1 Open Marketing

As a general rule, all Real Estate Assets must be openly marketed for sale to ensure current market value is obtained<sup>1</sup>.

#### 4.1.1 Exceptions to Open Marketing

Subject to Section 4.2 below, the sale of a Real Estate Asset may be concluded without open marketing in the following circumstances:

- (a) Where specific written advice (either legal or professional) has been obtained by NAMA in relation to the disposal of the Real Estate Asset recommending that open marketing should not be pursued for commercial or legal reasons giving rise to material risks. Such Real Estate Assets will be offered at the appraised market value, confirmed by way of independent valuation report received by NAMA;
- (b) Where a government entity or State/Semi-State body has approached NAMA, or any of its subsidiaries, to purchase a Real Estate Asset for legitimate reasons in the public interest<sup>2</sup>;

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<sup>1</sup> NAMA Board have approved certain scenarios are deemed out of scope for the purpose of this policy requirement. Reference should be made to NAMA where there is any doubt as to whether open marketing is required

<sup>2</sup> Per existing NAMA Board policy, NAMA will engage proactively with Government Departments, local authorities, State Agencies and other appropriate bodies and entities in relation to their possible need for land/properties in the public interest (e.g. social housing, schools, water and other infrastructure, health centres, hospitals, community and amenity facilities, cemeteries, warehouse space). Such assets will be offered at the appraised market value, confirmed by way of independent valuation, to such bodies for four weeks prior to open market offering. Any agreed sales to such entities will be subject to contract where such

- (c) Where the Real Estate Asset is the subject of a compulsory purchase order (CPO) by a State Body or Local Authority. The Debtor should be professionally advised with the adviser entering into a duty of care arrangement with NAMA;
- (d) In instances where NAMA via NARPS is acquiring assets for Social Housing from NAMA Debtors or Insolvency Office Holders<sup>3</sup>, noting that an independent market valuation report must exist.

Where any exceptions are proposed for legal or commercial reasons, prior approval of the CEO and Head of Asset Management and Recovery /Head of Residential Delivery of NAMA must be obtained and the market value must be confirmed by way of independent valuation.

#### **4.2      Section 172**

All Real Estate Asset sales by NAMA must comply with S172 (3) of the NAMA Act which provides as follows:

*“A person who is the debtor in relation to an acquired bank asset, who is a person referred to in any of subparagraphs (i), (ii), (iii), (v) or (vi) of section 70(1)(b) or who is a person on whose behalf the debtor or the person referred to in one of those subparagraphs acts as a nominee or trustee in relation to an acquired bank asset shall not, if any of those persons is in default in relation to any acquired bank asset, acquire from NAMA or a NAMA group entity, any legal or beneficial interest in property comprised in the security forming part of any acquired bank asset in relation to which the default has occurred.”*

In essence, where there is a default by any of the above persons in respect of any acquired bank asset, none of the persons can acquire an interest from NAMA in any property securing a bank asset in respect of which the default has occurred.

NAMA has adopted a policy of obtaining (written) assurance from a purchaser of Real Estate Assets (where the vendor is either a Debtor or IP) that the purchaser is not “connected” with the relevant Debtor in the manner set out in S172 (3) of the NAMA Act.

#### **Sale by Debtor:**

- All sales of Real Estate Assets (by Debtors) must be supported by a Purchaser’s Confirmation in the format at **Appendix 1**.
- The Sales Agent appointed by the Debtor to market the Real Estate Asset should obtain a Confirmation from the Purchaser in the required form prior to entering into a binding contract for sale.

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contract must be negotiated and agreed within a four week period from the date the entity expressed an interest in purchasing the asset. The closing date in the contract for sale should be no more than 90 days from the date of the contract.

<sup>3</sup> NAMA will not direct any insolvency professional. The discretion to sell any asset to NAMA or not is solely a decision for them.

## **Sale by Insolvency Office Holder (IP):**

- All Real Estate Asset sales contracted by Insolvency Office Holders (IPs) must include the Purchaser's Warranty in the format at **Appendix 2**.

If it is determined by the Participating Institution/IP/Service Provider, having made due enquiries and taken legal advice, that a sale to a “connected party” should proceed notwithstanding this policy, the matter should be referred to NAMA for prior approval of the sale.

### **4.3 Excluded Persons**

NAMA Board Policy requires the appointed Sales Agent or IP to also obtain separate written confirmation from the purchaser that neither the purchaser, nor any person with a beneficial interest in the transaction, is an Excluded Person.

The form of confirmation to be obtained from each purchaser is below and is included in the declaration templates attached at **Appendix 1** and **Appendix 2**.

***“[The Purchaser] further confirms that neither the Purchaser nor any person with a beneficial interest in the sale is an Excluded Person....”***

Where the Purchaser is **not** in a position to provide such confirmation/warranty, this should be brought to the immediate attention of NAMA (by the Debtors/IPs Sales Agent).

An **Excluded Person** is defined as:

1. Any person employed by NTMA who is assigned to NAMA (i.e. under S42 of the Act)
2. Any person working in a Participating Institution or Master, Primary or Special Service Provider to NAMA who:
  - a. either works, or has worked in the past 12 months, in the designated “NAMA Unit” of the Participating Institution or Master, Primary or Special Service Provider; or
  - b. has access to/knowledge of NAMA sensitive information\*(as outlined below) or had such access/knowledge in the last 12 months.

\* **Sensitive information** is defined as any of the following:

- information which would provide an unfair advantage over other potential purchasers where such information was obtained as a result of working in a

Participating Institution or Master, Primary or Special Service Provider (See 2. above), or

- information which could result in a conflict of interest, whereby professional judgement or actions regarding the transaction is unduly influenced by a personal/secondary interest in the transaction, or
- privileged or proprietary information which, if disclosed, may affect the price of an asset, or a reasonable purchaser/investor would want to know before investing in an asset.

In the case of Debtor sales, this confirmation may be included within the S172 **Purchaser's Confirmation** being provided by the purchaser, in the format at **Appendix 1**.

In the case of IP/analogue office holder sale, this confirmation may be included in the **Purchaser's Warranty**, in the format at **Appendix 2**.

#### 4.4 Sales Agents – Appointment, Role and Reporting

##### 4.4.1 Appointment of Sales Agent

Generally, it is expected that Agents will be appointed following an informed arm's length selection process, the Agent will be expected to enter into a duty of care agreement with an obligation to NAMA, including acknowledging NAMA's statutory requirements in general and NAMA's S172 (3) policy in particular. Sale instruction and contracts with Agents require NAMA prior approval.

- At the outset the Agent should disclose to NAMA any commercial relationship with the Debtor in the last five years.
- An appointed Agent should have no interest in the Real Estate Asset under sale.
- The appointed Agent should have a suitable level of professional indemnity insurance having regard to the size and nature of the Real Estate Asset. (Any queries on professional indemnity cover should be directed to NAMA.)
- The Agent should not be entitled to delegate his instruction to a sub-Agent.
- Contracts with Agents handling Asset disposals should not exceed an initial 12 months and must be capable of being terminated at any time by notice in writing stating the reasons for such termination.
- In limited circumstances where it is approved that the Debtor retains an "in house" sales team the Debtor shall be deemed to be the Agent for the purposes of Section 4.4 (and all sub-clauses) and shall report accordingly.

##### 4.4.2 Role of Sales Agent

- All disposals are to be conducted in a demonstrably impartial and professional manner.
- During the sales process, the appointed Agent will be expected to report to NAMA and the Debtor/Insolvency Practitioner at a frequency agreed with the NAMA case manager.

#### 4.4.3 Sales Agent Reporting

For details on Sales Agent Reporting Requirements, please contact your NAMA Case Manager directly.

## 5 Personal Data and GDPR

NAMA is subject to the requirements of the General Data Protection Regulation (“GDPR”) and the related Data Protection Act 2018 (together “Data Protection Law”) from 25 May 2018. All NAMA Staff are responsible for processing and managing Personal Data in accordance with Data Protection Law and in accordance with NAMA’s Data Protection Policy. Queries in this regard should be addressed to the NAMA Data Protection Officer

## 6 Definitions

Term	Definition
<b>Agent or Broker</b>	Third party real estate service firm experienced in the disposal of real estate in the relevant market place appointed by a Debtor or Insolvency Office Holder.
<b>Auction</b>	A sale (usually held in public) in which property is sold to the highest bidder, provided the amount offered exceeds any reserve, i.e. the lowest acceptable price, fixed by the vendor. Occasionally, but not often, properties may be offered without a reserve price, in which event the highest bid will be accepted however low it may be.
<b>Connected Party</b>	The manner by which a person may be connected to a Debtor for the purposes of this Policy is set out within the Confirmations/Warranty in Appendices 1 and 2. Broadly, it includes either (a) a subsidiary company or related company of the Debtor, (b) a nominee of the Debtor, or another associated Debtor, (c) a trustee for a Debtor, the Debtor’s nominee or a company controlled by the Debtor, (d) a company of which the Debtor is the sole shareholder or is otherwise controlled by the Debtor or (e) a person on whose behalf the Debtor acts as nominee or trustee. As such, it does not include an

Term	Definition
	association through partnership or family connections unless that family member falls into the foregoing categories.
<b>Data Protection Procedures</b>	All procedure and process documents relating to the implementation of NAMA's Data Protection Policy, including the NAMA Data Protection Procedure Manual, NAMA Data Subject Rights Requests Procedure, NAMA Data Breach Procedure and any other documents that may be introduced in this regard.
<b>Debtor/Debtor Connection</b>	<p>A person who is or was indebted or obligated to a Participating Institution under or in connection with a credit facility acquired by NAMA.</p> <p>A Debtor Connection is a bundle of loans that have been grouped together as they are connected or linked to a Debtor.</p>
<b>Insolvency Practitioner(IP)</b>	Contractual, statutory or court appointed official appointed to an insolvent entity or pursuant to a charge, according to custom and practice of the relevant jurisdiction, e.g. Receiver.
<b>NARPS</b>	National Asset Residential Property Services
<b>NAMA Officer</b>	Any employee of the NTMA who is assigned to NAMA in accordance with section 42 of the NAMA Act 2009
<b>NAMA Staff</b>	All NAMA Officers and members of NAMA's Board and its committees
<b>Personal Data</b>	Any information relating to an identified or identifiable living individual ("Data Subject") which allows the identification, directly or conjunction with other information, of that individual.
<b>Other assets</b>	Any asset owned by a Debtor that does not meet the definition of "Real Estate" above and which is either subject to security in favour of NAMA or the Debtor has agreed to use the proceeds of disposal of that asset to reduce NAMA debt. These are commonly referred to as non-real estate assets or NRE.
<b>Private Treaty</b>	The most common method of disposal of real property, in which negotiations are carried out between the vendor and prospective purchasers (or their respective Agents) privately and in comparative confidentiality, normally without any limit on the time within which the

Term	Definition
	negotiations must be completed before contracts are exchanged.
<b>Public Tender</b>	A Tender open to any member of the public who is able to fulfil the requirements specified in the tender document, the tender being advertised for this purpose.
<b>Quantum Meruit</b>	As much as it is worth: an expression used especially in relation to fees for services (in the absence of any other contractual arrangement), based upon the time required to deliver the quantity and quality of the service provided and any abortive costs directly incurred in the provision of the services for which prior approval from NAMA has been obtained.
<b>Sealed Bid</b>	An offer, usually in the form of a tender, submitted in a sealed package on the understanding that it will be opened simultaneously with other competitive offers at a stated time and place. In some circumstances tenderers are permitted to be present when the bids are opened.
<b>Security</b>	Includes a charge, guarantee, indemnity or surety, right of set off, debenture, bill of exchange, promissory note, collateral and any other means of securing the payment of a debt or the discharge or performance of an obligation or liability and any other agreement having a similar effect.
<b>Tender</b>	In the property market, the process method whereby competitive bids are sought from a number of prospective or potential buyers/lessees/contractors normally submitted on or before a specified time and date (as distinct from an auction).
<b>Purchaser's Warranty</b>	A contractual representation made by the purchaser to NAMA. The form of warranty is provided in Appendix 2.

# **Appendix 1 - Sale by Debtor: Substantive Content of Purchasers Confirmation**

**[On letterhead of Purchaser]**

Re: Proposed purchase of [detail property] from [name of owner]

**[Addressed to the debtors Agent]**

**"[The Purchaser is/ the Purchaser confirms that it/he/she is]:**

- (a) *not a person connected to [name of owner ] where “person connected to [name of owner ]” means any of the following:*
- (i) *a subsidiary company or related company (as defined under the relevant Companies Acts in the jurisdiction governing this Contract and each or both being referred to as “a Relevant Company” )of [name of owner ];*
  - (ii) *a company of which [name of owner ]is the sole shareholder (“an Owned Company”);*
  - (iii) *a company controlled by [name of owner ], that is to say [name of owner ] has an interest (either alone or together with (a) a Relevant Company, (b) a nominee (as defined in (iv) below) of [name of owner ], (c ) a trustee of [name of owner ], (d) a person in partnership with [name of owner ]in connection with any credit facility or security or (e) an Owned Company) in 25% or more of the equity share capital or entitled to exercise or control the exercise of 25% or more of the voting powers at any general meeting;*
  - (iv) *a nominee , or person who may or does in fact act at the direction, of either [name of owner ] or any of the parties referred to at (i) to (iii) above;*
  - (v) *a trustee (whether or not declared) where the beneficiaries include, directly or indirectly, [name of owner ] or any of the parties referred to at (i) to (iv) above.*
- (b) **[The Purchaser]** further warrants and confirms that the Purchase Price payable under the Contract for Sale comprises the entire consideration being paid or passing in any form and at any time from the Purchaser in respect of the Subject Property and there are no other arrangements or agreements in any form between the Vendor and Purchaser that are connected with the Subject Property and through which the Vendor may benefit

(c) [The Purchaser] further confirms that neither the Purchaser nor any person with a beneficial interest in the sale is an Excluded Person, where "Excluded Person" means any of the following:

- (i) Any person employed by NTMA who is assigned to NAMA (under section 42 of the National Asset Management Agency Act, 2009)
- (ii) Any person working in a Participating Institution or Master, Primary or Special Service Provider to NAMA who:
  - (a) either works, or has worked in the past 12 months, in the designated "NAMA Unit" of the Participating Institution or Master, Primary or Special Service Provider; or
  - (b) has access to/knowledge of "NAMA sensitive information\*" or had such access/knowledge in the last 12 months.

\*For this purposes of this confirmation, "NAMA sensitive information" means any of the following:

- information which would provide an unfair advantage over other potential purchasers where such information was obtained as a result of working in a Participating Institution or Master, Primary or Special Service Provider; or
- information which could result in a conflict of interest, whereby professional judgement or actions regarding the sale are unduly influenced by a personal/related beneficial interest in the sale; or
- privileged or proprietary information which, if disclosed, may affect the price of the subject property, or which a reasonable purchaser/investor would want to know before investing in the property."

Signed: \_\_\_\_\_

[Purchaser]/ Authorised signatory of [Purchaser]

Dated: [Insert Date]

## **Appendix 2 - Sale by Receiver/analogous office holder: Special Condition of Sale - Purchaser's Warranty<sup>1</sup>**

Re: Proposed purchase of [detail property] from [name of owner]

"The Purchaser warrants that it/he/she is:

- (a) *not a person connected to [name of owner, by whom the receiver is acting ] where "person connected to [name of owner, by whom the receiver is acting ]" means any of the following:*
- (i) *a subsidiary company or related company (as defined under the relevant Companies Acts in the jurisdiction governing this Contract and each or both being referred to as "a Relevant Company") of [name of owner, by whom the receiver is acting ];*
  - (ii) *a company of which [name of owner, by whom the receiver is acting ] is the sole shareholder ("an Owned Company");*
  - (iii) *a company controlled by [name of owner, by whom the receiver is acting ], that is to say [name of owner, by whom the receiver is acting ] has an interest (either alone or together with (a) a Relevant Company, (b) a nominee (as defined in (iv) below) of [name of owner, by whom the receiver is acting ], (c) a trustee of [name of owner, by whom the receiver is acting ], (d) a person in partnership with [name of owner, by whom the receiver is acting ] in connection with any credit facility or security<sup>4</sup> or (e) an Owned Company) in 25% or more of the equity share capital or entitled to exercise or control the exercise of 25% or more of the voting powers at any general meeting;*
  - (iv) *a nominee , or person who may or does in fact act at the direction, of either [name of owner, by whom receiver is acting ] or any of the parties referred to at (i) to (iii) above;*
  - (v) *a trustee (whether or not declared) where the beneficiaries include, directly or indirectly, [name of owner, by whom receiver is acting ] or any of the parties referred to at (i) to (iv) above.*

(b) **[The Purchaser]** further warrants and confirms that the Purchase Price payable under the Contract for Sale comprises the entire consideration being paid or passing in any form and at any

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<sup>1</sup>This Warranty can also be included in any contract for sale to obviate the need to obtain a separate Purchaser's Confirmation

Note: where warranty (a)(iii)(d) cannot be provided, the receiver should obtain clarification from the purchaser as to why this cannot be given and the receiver should then revert to NAMA for specific instructions.

*time from the Purchaser in respect of the Subject Property and there are no other arrangements or agreements in any form between the Vendor and Purchaser that are connected with the Subject Property and through which the Vendor may benefit*

(c) **[The Purchaser]** further confirms that neither the Purchaser nor any person with a beneficial interest in the sale is an Excluded Person, where “Excluded Person” means any of the following:

- (i) Any person employed by NTMA who is assigned to NAMA (under section 42 of the National Asset Management Agency Act, 2009)
- (ii) Any person working in a Participating Institution or Master, Primary or Special Service Provider to NAMA who:
  - (a) either works, or has worked in the past 12 months, in the designated “NAMA Unit” of the Participating Institution or Master, Primary or Special Service Provider; or
  - (b) has access to/knowledge of “NAMA sensitive information\*” or had such access/knowledge in the last 12 months.

\*For this purposes of this confirmation, “NAMA sensitive information” means any of the following:

- information which would provide an unfair advantage over other potential purchasers where such information was obtained as a result of working in a Participating Institution or Master, Primary or Special Service Provider; or
- information which could result in a conflict of interest, whereby professional judgement or actions regarding the sale are unduly influenced by a personal/related beneficial interest in the sale; or
- privileged or proprietary information which, if disclosed, may affect the price of the subject property, or which a reasonable purchaser/investor would want to know before investing in the property.”

**NOTE:** All contracts of sale entered into by receivers or analogous office holders must include the warranty set out above. Receivers should instruct their legal advisers accordingly.